No. 87-203

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1986.

THEODORE E. HARVEY,
PETITIONER,

v.

RICHARD A. SUBATCH,
RESPONDENT.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The decision of the court below is thorough, supported by the record and does not sanction a departure from the accepted course of trial court proceedings.

Statement of the Facts.

The respondent supplements the petitioner's statement of the facts regarding the incident in the State Police barracks guardroom with the following evidence.

The plaintiff testified that he was brought into the guardroom with his arms handcuffed behind his back. He was given a hard push from behind by someone whom he could not identify and fell headlong onto the floor (Tr. Vol. III, 23).[1] When he raised his head he felt another blow smashing his face back to the floor cutting his face (Tr. Vol. III, 24). Subsequently he was transported to a local hospital by ambulance accompanied by Trooper Harvey. He recollected that Trooper Harvey loosened the handcuffs at the hospital in response to his request (Tr. Vol. III, 25). Thomas Nickerson, a passenger in plaintiff's van who was also transported to the State Police barracks, testified that as he was being led past the door to the guardroom he saw plaintiff shoved from behind by one of the officers (Tr. Vol. III, 113-114). He then saw Trooper Harvey raise his heel and kick the plaintiff in the back of the head (Tr. Vol. III, 114).

Trooper Harvey testified that when he first entered the guardroom the plaintiff was lying face down on the floor writhing and yelling (Tr. Vol. V, 64-65). The plaintiff was handcuffed with his arms behind his back (Tr. Vol. V, 65). He grasped the plaintiff by the back of his shirt in an effort to pick him up but the plaintiff struggled, fell back to the floor injuring his head (Tr. Vol. V, 65-66). The plaintiff fell to the floor from a distance below the trooper's knees (Tr. Vol. V, 75).

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[1] Abbreviations used in this brief: "Tr." for trial transcript; "Pet." for petition; "App." for petitioner's appendix.

Reasons to Deny the Petition.

The defendant petitions for a writ of certiorari to review a decision that has no application or relevance beyond the facts introduced into evidence at the trial of this particular case. The defendant does not claim the court below applied an incorrect or unsettled standard in its review of the trial court proceedings. He objects that the court below, evaluating those portions of plaintiff's closing argument to which defendant objected in the light of the evidence and the trial court's instructions, did not draw the conclusions the defendant had urged on it.

This issue, confined as it is to the circumstances of a single case, is far short of the "special and important reasons" (Sup. Ct. R. 17) necessary to justify the court's consideration of it. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955) ("'Special and important reasons' imply a reach to a problem beyond the academic or episodic"). Moreover, the issue is empty; the conclusions of the court below are supported by the record.

A. *Reference to the Dirty Harry Character.*

The court below held that there was no prejudicial error in the plaintiff's closing argument reference to the film character, "Dirty Harry" Callahan, as it did not invite the jury to draw any inferences which were not supported by testimony of plaintiff's witnesses: ". . . [T]he salient characteristics of the 'Dirty Harry' character mentioned by the plaintiff are, if plaintiff's evidence is believed, attributable to defendant's alleged conduct in the case at bar." (App. 7a.)

The defendant finds this conclusion "rather remarkabl[e]" (Pet. 14). Does he mean to suggest that an unprovoked kicking of a manacled arrestee would not have been lawless, ruthless or an individual brand of "justice" dispensed in disregard for constitutional rights? (Pet. 12.)

It was uncontested at trial, affirmed by the testimony of police and civilian witnesses, that the plaintiff was injured in the barracks guardroom and that his arms were manacled behind his back until after he was injured. The defendant did not attempt to refute the entirely reasonable and, indeed, compelling inference that a beating administered by a police officer in the manner and circumstances related by the plaintiff and Thomas Nickerson could have been justified as necessary to restrain plaintiff. His defense was that the shove toppling the plaintiff and subsequent kick to his head simply never occurred.

The reference to the "Dirty Harry" character did not promote considerations of extraneous social, religious or ethnic matters or promote characterization of the events in the guardroom which were not deducible from the plaintiff's account of an unprovoked and unjustified beating.

The jury clearly was not impassioned against police officers. The jurors delivered verdicts in favor of Trooper Balestia and Officer Begley.

The defendant has never complained that the trial court's instructions failed to properly distinguish between the factors to be weighed by the jury in considering compensatory and punitive damages. The punitive damages, reflecting the jury's assessment of the character of the defendant's behavior and the very subject on which the defendant argues the jury was impassioned against him, were $10,000 or a modest two percent of the amount the jury assessed to compensate the plaintiff for his injuries.

B. *Reference to Joseph Stone's Investigation.*

The court below had solid ground for concluding that the defendant was promptly and effectively shielded from any potentially adverse influences in the contested portion of plaintiff's argument on the testimony of Joseph Stone. In order for

the jury to infer that Mr. Stone had formed negative opinions as a result of his investigation, the first jury had to infer that the defendant had not called Mr. Stone for this reason. The trial judge immediately instructed the jury against drawing any inference from the fact a person did or did not testify (Pet. 9a), thus, in barring the first inference, foreclosing as well the dependent inference regarding Mr. Stone's opinions. Furthermore the jurors had heard Mr. Stone testify about his investigations, but they had not heard him express any opinions because the trial court had not permitted inquiry into his conclusions (Pet. 8a). The judge addressed her reasons directly to the jury stating that any conclusions by Stone would be based on statements from people ". . . who are not before you and not subject to cross-examination here; and, therefore, it would be inappropriate to admit this evidence to you because nobody is here to test it . . ." (Tr. Vol. V, 32).

Thus, well before closing argument the jury had been told that Stone's conclusions, whatever they were, were not reliable.

Conclusion.

The decision of the court below does not sanction a departure from the accepted course of trial court proceedings and does not warrant exercise of this Court's supervisory powers. Respondent respectfully submits that the petition should be denied.

Respectfully submitted,

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